KENYA

TRADE SUMMARY

In 2000, the U.S. merchandise trade surplus with Kenya was $128 million, an increase of $46 million from 1999. U.S. exports to Kenya were $238 million, representing a $49 million increase from 1999. Kenya was the United States' 83rd largest export market in 2000. U.S. imports from Kenya were $110 million, an increase of $3 million from 1999. The stock of U.S. direct investment in Kenya declined to $188 million in 1999, a decline of almost 7 percent from 1998.

OVERVIEW

In July 1999, the Kenya Government instituted reforms designed to improve economic governance and encourage the IMF and World Bank to reinstate their Kenya programs. Progress was made in cleaning up government procurement practices and bringing government expenditures under control. As a result of these and other efforts, the IMF approved a Poverty Reduction and Growth Facility (PRGF) for Kenya in July 2000 and in August, the World Bank approved an Economic and Public Sector Reform Credit (EPSRC). The Government of Kenya had hoped that the return of the international financial institutions (IFIs) would improve investor confidence in Kenya. However, although investors were pleased to see the IFIs return, there was no noticeable increase in investment inflows. Investor skepticism proved accurate; towards the end of 2000, the Government of Kenya failed to meet its agreed commitments under the PRGF to improve economic governance. The decision by Kenya's courts declaring the Kenya Anti-Corruption Authority illegal, together with Parliamentary setbacks for the government on economic governance legislation linked to the PRGF; have dealt a significant blow to the government's reform efforts . While the government remains publicly committed to continued trade liberalization and structural reform, issues of governance and the rule of law continue to erode investor confidence.

Despite its economic problems, Kenya has become an increasingly important hub for African trade, as is evidenced by the growing importance of African trading partners to Kenya. Kenya is a member of the newly re-established East African Cooperation (EAC) and remains an active member of the IGAD, COMESA, and the WTO. Although initially slow to honor its WTO commitments, Kenya has now implemented the WTO Customs Valuation Agreement and the Financial Services Agreement, and is working to pass legislation to implement TRIPS.

IMPORT POLICIES

In the 1990s, the Government of Kenya exhibited ongoing interest in liberalizing trade and restructuring many of its most important industry sectors. Tariffs are now the government's primary instrument for trade policy. The overall tariff structure has been simplified and though still quite high, many tariffs have been reduced.

The Government of Kenya usually announces tariff changes in its annual budget speech. In June 2000, the government announced an increase in the import duty on all oranges, apples and pears from 25 percent to 35 percent as a means of protecting local farmers. However, duties on crude palm oil, vitamins, dyes, some steel products, some basic chemicals, unassembled radios, household refrigerators and washing machines were reduced from 10 percent to 2.5 percent.

The June budget also did away with "suspended" (stand-by) duties on all products except oil products (e.g., gasoline, crude oil, aviation fuels, kerosene, and motor spirits). The Government of Kenya still carefully controls imports of seed corn by subjecting hybrid varieties to a tedious certification process that effectively restricts trade. Until a seed variety is fully registered (a process that can take 3-4 years), the Ministry of Agriculture restricts cereal seed imports by setting quantitative ceilings. However, once a variety is certified, the quantitative restrictions are lifted.

Customs Procedures

At the start of 2000, Kenya was scheduled to implement the WTO Customs Valuation Agreement. Under the Agreement, Kenya must use the transaction value for valuation of goods imported from other WTO signatories. WTO records show that Kenya has not yet notified its legislation nor the Customs Valuation Checklist to the WTO Committee on Customs Valuation.

Kenya continues to maintain its preshipment inspection (PSI) regime. The government recently appointed two companies to handle PSI services: COTECNA Inspection, S.A., and Intertek Testing Services International. These companies began providing services on February 1, 2001, under a two-year contract, with part of their mandate being to ensure that up-to-date Customs Valuation and Risk Assessment methods are applied. The government has not yet issued detailed regulations on the countries from which the two firms would be inspecting imports.

STANDARDS, TESTING, LABELING AND CERTIFICATION

The Kenya Bureau of Standards (KBS), a government regulatory body under the Ministry of Trade, Tourism, and Industry, inspects imports to ensure conformity to International Standardization Organization (ISO) and other product standards. KBS is in the process of reviewing all standards, especially those more than 10 years old. About 500 standards still need to be reviewed. KBS also conducts product testing and certification for individual product categories. Products that do not meet KBS standards are withdrawn from the market and the importer is prosecuted. KBS has regular meetings with local manufacturers to address problems arising from the importation of illegal, counterfeit, and substandard goods.

Certain imported agricultural goods are subject to further inspection by the Kenya Plant Health Inspectorate Service (KEPHIS). KEPHIS regulates the importation and exportation of plant materials and the trade in biosafety control organisms (organisms that require special handling to ensure they are not accidentally released into the environment) in accordance with the International Plant Protection Convention (IPPC). The Inspectorate evaluates commercial hybrid grain seeds for a period of three years before the seeds can be released to market. This certification process is tedious and restrictive, and the three-year period needed for the government to approve or reject a variety is burdensome.

GOVERNMENT PROCUREMENT

According to government regulations, goods worth more than Kshs 10,000 (approximately $128) and less than Kshs 200,000 (approximately $2,564) must have three competitive quotations and be adjudicated by three responsible officers. Goods and services valued at over Kshs 200,000 and less than Kshs 5,000,000 (approximately $64,102) must go through an open tender process adjudicated by the Ministerial Tender Board. Goods and services worth in excess of Kshs 5,000,000, apart from the requirement of going through the Ministerial Tender Board, must also be approved by the Central Tender Board. Since September 1999, the government has taken measures to make the public procurement process more transparent. These measures have included affording wider publicity to government tenders, establishing an appeals committee, and appointing people from the private sector to the Central Tender Board, the main decision-making agency for large-scale government purchases. The government has increased transparency in bidding by removing from its tenders the clause that read, "The government reserves the right to accept or reject any bid and is not obliged to give any reasons for its decisions." Now, the Central Tender Board publishes its decisions and, if the bidder asks, provides reasons for rejecting certain bids. Kenya is not a signatory to the WTO Agreement on Government Procurement.

EXPORT SUBSIDIES

Firms in export-processing zones are allowed to purchase imported inputs tax free. According to Trade Ministry officials, firms in export-processing zones are allowed to sell up to 20 percent of their output on the domestic market. However, Ministry officials state that these products are usually second quality. In order to discourage the practice, EPZ firms are liable for all taxes on the products plus a 2.5 percent penalty on goods sold locally. Nevertheless, reports of EPZ abuse continue to surface. For example, a local battery manufacturer reports that his investigators, working with the Kenya Revenue Authority, recently uncovered an operation bringing in finished batteries and pre-printed "Made in Kenya" labels to an EPZ, where they were assembled and shipped out for sale on the Kenyan market and in the region. Based on the evidence uncovered, Kenyan authorities have begun an investigation.

The government claims that it has discontinued below-market loans to export-oriented businesses. While no general system of preferential financing currently exists, sectoral government development agencies in areas such as tourism and tea are supposed to provide funds at below-market rates to promote investment and exports by Kenyans.

INTELLECTUAL PROPERTY RIGHTS PROTECTION

Kenya is a member of the World Intellectual Property Organization (WIPO) and the African Regional Industrial Property Organization, and is a signatory to both the Paris Convention on the Protection of Industrial Property and the Berne Convention on the Protection of Literary and Artistic Works. Although a unified system for the registration of trademarks and patents from Anglophone Africa was agreed to in 1976, the effort has not been effective due to the lack of coordination and funding. Future protection may be afforded through the African Intellectual Property Organization, but member cooperation and enforcement procedures are untested.

As a member of the WTO, Kenya must implement the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The government has initiated steps to amend the country's intellectual property laws to bring them into conformity with WIPO guidelines, the TRIPS Agreement, and other international conventions. In 1999, the government presented the Industrial Property and Trademark Acts to Parliament; however, as a result of opposition to the draft bill from various stakeholders and interest groups (including Action Aid, Doctors Without Borders, and the Kenya Association of Manufacturers), the bill stalled in Parliament. In response to consultations with stakeholders, the government plans to re-introduce an amended version of the bill in 2001 as the Industrial Property Bill. The now separate Trademarks Bill, which is also pending before Parliament, has been amended to conform to the Madrid Agreement and Protocol as well as the TRIPS Agreement. The government has drafted a "Layout Designs of Integrated Circuit Bill" and a "Geographical Indicators Bill," and circulated copies to stakeholders and the WIPO for comments.

The Kenyan Copyright Act protects audio as well as video recordings. Violations are subject to a fine of up to $3,600 or imprisonment for five years, or both. In practice, however, the Office of the Attorney General (which is responsible for copyright matters) and the police seldom enforce the laws. Pirated sound recordings are common, and virtually all videos available in shops are unlicensed. A new Copyright Act, designed to be compliant with WIPO and international standards, has been tabled in Parliament, and the government intends to pass this Bill during the current session. Local artists and musicians are agitating for rapid action on the bill. However, given the number of other, higher priority Bills before Parliament, and the expected elections in 2002, it is unlikely that the Copyright Act will become law soon.

Kenya is a member of the Union for the Protection of New Varieties in Plants (UPOV). However, because the necessary legislation has not moved in Parliament, the country has not yet acceded to ratified the UPOV Convention on Plant Variety Protection and its laws do not yet conform to these international regulations.

SERVICES BARRIERS

A U.S. bank prepared the flotation of shares by Kenya Airways and a U.S. life insurance firm is the leader in its industry sector. Nevertheless, foreign companies offering services in construction, engineering, and architecture may face discrimination on tenders for public projects. In addition, new foreign investors with expatriate staff are required to submit plans for the gradual elimination of non-Kenyan employees. In 1999, the government increased fees and security bonds under the Immigration Act by 50 percent to 100 percent in an attempt to discourage the employment of foreign labor. Fees for foreign students were excluded from this increase. The Kenyan bar has declined to admit foreign lawyers for a duration of more than 12 years.

The only privatizations of note since 1995 have been the sale of state-owned tourist facilities and the flotation of shares of state-owned financial institutions on the Nairobi Stock Exchange. The government failed to privatize the Kenya Reinsurance Corporation in 2000 as planned, and the long-delayed effort to find a strategic partner for the Kenya Commercial Bank has only recently been re-launched in February 2001.

The government continues, albeit haltingly, to liberalize the telecommunications sector. Although the government successfully auctioned a second GSM cellular license and sold eight regional telephone operating licenses, it has so far failed to conclude a deal to sell 49 percent of TelKom to an international consortium of private investors. How the TelKom deal eventually unfolds will have a large impact on the government's ability to find buyers for its other privatization/commercialization efforts, including Kenya Rail and the Kenya Ports Authority.

Under the Kenya Communications Act of 1998, which became effective in on July 1, 1999, the Government of Kenya dissolved the Kenya Posts and Telecommunications Corporation (KPTC). KPTC was succeeded by three separate entities: TelKom Kenya (telecommunications); the regulatory body, the Communications Commission of Kenya (CCK); and the Postal Corporation of Kenya (postal services). As it stands, TelKom will be permitted to maintain its monopoly in segments of the telecommunications market for five years (1999-2004). The government has licensed two firms, Safaricom (a joint venture of TelKom and Vodafone) and Kencell (a joint venture of Vivendi and Sameer Investments), to provide mobile cellular telecommunications. As of early 2001, these two companies had over 160,000 subscribers combined, well over half of the 300,000 land lines provided by TelKom. In February 2000, the CCK issued a tender notice for eight regional telecommunications licenses to operate local and regional long-distance services in competition with TelKom Kenya. In August, the government announced that three Kenyan firms had succeeded in acquiring the rights to operate the eight regional licenses. Telair Communications landed five of the eight licenses for a reported $23 million. Safitel netted two regional licenses for $9 million and Bell-Western acquired the remaining regional license for $25,000.

INVESTMENT BARRIERS

Although the government's macroeconomic stabilization and gradual economic reform efforts have paved a wider road for the private sector, Kenya may still not succeed in attracting the foreign investment it needs to fuel higher economic growth because of its poor record on fighting corruption. While much depends upon whether the government continues sector reform and trade liberalization, the real key to attracting new investors is the government's anti-corruption policy. Tight fiscal policies have brought inflation under control. The financial system has been restructured and measures taken to increase the role of the private sector and establish greater accountability and transparency with respect to financial infractions. A managed floating exchange rate regime has been adopted and companies may now retain foreign exchange earnings and repatriate capital and profits without certification. The government has identified more than 200 parastatals for privatization and another 33 for restructuring. However, while the government publicly acknowledges the importance of dealing with governance issues, and the reform team has scored some early successes, setbacks to the government anti-corruption and economic reform efforts in late 2000 to early 2001 have delayed much needed disbursements from the IMF and World Bank. Without these funds, the government may have to turn to the domestic credit market to finance its operations, which would drive up interest rates and crowd out private investors. Without a credible anti-corruption effort and demonstrated commitment to good governance, Kenya will continue to suffer from lackluster investor interest.

Restrictions and Regulatory Practices

The Government of Kenya has placed a number of restrictions on foreign ownership for publicly traded companies and in the areas of financial services and telecommunications. Foreign ownership of firms listed on the Nairobi Stock Exchange cannot exceed 40 percent for corporations and five percent for individuals. Where foreign ownership in a company exceeds 40 percent at the time of listing on the Nairobi Stock Exchange, the foreign owner is allowed to maintain (or reduce) but not to increase that share. Life insurance companies are required to have at least 33 percent local ownership. Foreign brokerage and fund management firms must be locally registered companies, in which case, fund management firms must be at least 30 percent Kenyan-owned and brokerage firms 51 percent Kenyan-owned.

Internet Service Providers (ISPs) also operate in Nairobi under significant restrictions. As telecommunications companies, foreign ownership of an ISP is restricted to 40 percent.

The Communications Commission of Kenya (CCK), limits the number of ISPs and prohibits them and other carriers from establishing switches, international gateways, or direct satellite links. This has forced continued dependency on TelKom Kenya and inhibited competition and improvements in customer service. The CCK specifically prohibits ISP's from providing the following services: voice telephony, uploading of telecommunications traffic by satellite, and use of wireless communications. In fact, ISPs must agree, in writing, not to provide Internet protocol telephony through their networks (paging services are excluded from this requirement). ISP's must also provide the CCK with information on what they charge for all services, as well as the names and addresses of their clients. CCK must also type-approve equipment that ISP's provide to clients. These regulatory practices make investing in this area considerably less attractive than it might otherwise be. The CCK regulates telecommunications and radio communications in the country (a role similar to the FCC in the United States), as well as postal services.

Difficulty in obtaining clear title to land, lack of confidence in the speedy and fair resolution of disputes, and requests from officials for illicit payments continue to dampen the country's prospects to attract greater foreign investment.

Technology transfer requirements and foreign exchange controls have been abolished. Local partners are encouraged but not required. Kenyan partners are no longer required for small-scale commercial enterprises.

Infrastructure

The Government of Kenya has been hesitant to open public infrastructure to competition because the state-owned companies that control infrastructure are considered "strategic" enterprises. For this reason, the reform and partial privatization of telecommunications, power, and rail has fallen behind schedule.

At the beginning of 1997, the government split the Kenya Power and Lighting Company (KPLC) into two entities: a power generator (KENGEN) and a distributor (KPLC). The government established an electricity regulatory board in April 1998 to regulate retail tariffs and approve power purchase contracts between KPLC and producers. The government also licensed two independent power producers (IPPs) to sell electricity to the grid. Despite these efforts, when an extended drought hit Kenya in 2000, water levels at Kenya's hydroelectric generating facilities fell well below minimum operating levels and Kenya was forced to implement a severe power rationing scheme. To mitigate the problems, Kenya secured a $100 million emergency power credit from the World Bank to bring in 110 Mw of additional, temporary, thermal generating capacity.

The Kenya Railways Corporation has contracted for the maintenance of some of its locomotives to General Electric. The company may be commercialized further along these lines.